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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

RIVERSIDE CEMENT CO.,

PETITIONER

v.

PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-192, AFL-CIO,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that "plausibility" is the legal test for requiring a trial court to litigate, and reach a factual conclusion, on whether a union's demand for arbitration over modification to benefits provided to retirees does or does not fall within an arbitration provision of a collective bargaining agreement?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Riverside Cement Company ("RCC") is a California general partnership. RCC's two general partners are TXI Riverside, Inc. and TXI California, Inc., which are both privately held corporations incorporated in the state of Delaware. No publicly held company owns ten percent or more of RCC's partnership interest. TXI Riverside, Inc. and TXI California, Inc. are owned 100% by Texas Industries, Inc, which is a publicly held corporation incorporated in the state of Delaware.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion and Order of the U.S. Court of Appeals for the Ninth Circuit, dated June 19, 2007 is reproduced at App. A, 1a-5a.

The Memorandum Opinion and Order of the U.S. District Court for the Central District of California (Phillips, V.) is reproduced at App. B, 6a-11a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on June 19, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Defendant, RCC manufactures cement at its Oro Grande Facility in Oro Grande, California. Plaintiff, Paper, Allied-Industrial Chemical and Energy Workers International Union, Local 8-192, AFL-CIO ("PACE") is a labor organization and the exclusive bargaining representative for all production and maintenance employees employed by RCC at its Oro Grande Facility.

A collective bargaining agreement ("CBA") exists between RCC and PACE. The recognition clause of the CBA, Article I, provides that RCC recognizes PACE as "the sole representative for purposes of collective bargaining with respect to wages, hours, and working conditions for all employees as defined herein at its Oro Grande, California plant. . ." (Excerpts of Record ("ER") 43.) This section goes on to define the term "employees" to include, "all production and maintenance *employees* employed by the employer at its Oro Grande, California facility." (ER 43, emphasis added). The section concludes with the following exclusionary statement: "The article[s] hereinafter set out shall apply to all *employees* in the above described unit . . ." (ER 44, emphasis added). There are no specific references anywhere in the CBA to retirees, retired employees, or to any benefit plans regarding retirees.

The Grievance Procedure of the CBA establishes a process, culminating in binding arbitration, for the resolution of disputes between RCC and PACE "with regard to the meaning or application of this Agreement." (ER 70.)

On May 13, 2005, PACE filed a complaint against RCC in the District Court of California, seeking to compel RCC to arbitrate a grievance submitted by PACE regarding RCC's refusal to negotiate over changes to the benefits it provides to retired employees. (ER 1.)

In the District Court, RCC moved to dismiss Plaintiff's complaint under Rule 12(b)(6) on the ground, *inter alia*, that Plaintiff's factual allegations do not support a claim for specific performance because no contractual duty toward retirees existed under the CBA and because the term "employee" as used in the recognition clause of a CBA excludes retirees. The District Court granted RCC's motion to dismiss. App. 6a-11a. The District Court reasoned that because the arbitration clause at issue was not susceptible to an interpretation covering disputes over retirees, RCC had established that Plaintiff could prove no set of facts in support of its claim that would entitle it to the relief sought. App. 10a-11a.

Plaintiff appealed the District Court's granting of RCC's motion to dismiss to the United States Court of Appeals for the Ninth Circuit. On June 19, 2007, the Ninth Circuit reversed and remanded the order of the District Court granting RCC's motion to dismiss. The Ninth Circuit held that the complaint could not be dismissed because "it is at least plausible that the CBA was intended to cover both current and former employees." App. 5a.

RCC petitions this Court for review of the decision of the Ninth Circuit holding that as used within the recognition clause of a CBA the term "employee" is "susceptible of meaning both currently 'employed' and previously 'employed'

[members of the bargaining unit]," and that a complaint may not be dismissed where it is "at least *plausible* that the CBA was intended to cover both current and former employees." App. 4a-5a (emphasis added).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's "plausibility" rule is contrary to the decisions of this Court regarding dismissal of a complaint for specific performance of a contractual duty to arbitrate. The Ninth Circuit's rule also subjects the employer to the burdens of litigation and, potentially, arbitration even though the plaintiff is unable to allege facts that meet the requirements set by the National Labor Relations Act and this Court.

This Court should grant certiorari to address the important question of whether the term "employee" as used in the recognition clause of a CBA includes retirees and to correct the unwarranted plausibility rule adopted by the Ninth Circuit.

I. THE NINTH CIRCUIT'S STANDARD FOR DISMISSAL CONFLICTS WITH THE DECISIONS OF THIS COURT

A. Retirees Are Not Employees For Purposes Of The National Labor Relations Act Or The Recognition Clause Of A Collective Bargaining Agreement

In *Allied Chemical & Alkali Workers Local I v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971), this Court held that retired employees are not employees within the meaning of the NLRA and therefore, there is no requirement that an employer bargain regarding the benefits received by the employees who had retired and, further, that the employer is entitled to unilaterally alter retiree

benefits without bargaining with the union beforehand. *Id.* at 180.

This Court further held that retirees were not, and could not, be "employees" included in the bargaining unit because the unit was composed of "employees of the Employer's plant . . . working on hourly rates, . ." *Id.* at 172.[1]

As set forth above, the recognition clause in this matter is virtually identical that that at issue in *Allied Chemical* and is confined to employees employed by the employer at a single facility.[2]

In reversing the decision of the District Court, the Ninth Circuit found that "the phrase '*employed* by the employer' – which is used to describe who is covered – is susceptible of meaning both currently 'employed' and previously 'employed.'" App. 5a. (emphasis in original). This finding by the Ninth Circuit ignores both the text of the recognition clause and the decision of this Court in *Allied Chemical.*

Under the express terms of the CBA, the "Company recognizes the Union as the sole representative for purposes of collective bargaining with respect to wages, hours, and working conditions for all. . . production and maintenance

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[1] The bargaining unit at issue in *Allied Chemical* was defined to include "all employees of the Employer's plant and limestone mine at Barberton, Ohio, working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors. . ." *Allied Chemical, supra,* at 161 n. 1.

[2] Article 1.2 of the CBA provides: "The Company recognizes the Union as the sole representative for purposes of collective bargaining with respect to wages, hours and working conditions for all employees as defined herein at its Oro Grande plant. . ." As certified by the National Labor Relations Board, the covered employees include "All production and maintenance employees employed by the employer at its Oro Grande, California Facility." (ER 43).

employees employed by the employer at its Oro Grande, California facility." (ER 43), Thus, the very text of the recognition clause confines the scope of the CBA to wages, hours and working conditions of employees.

Additionally, this Court has taught that "the ordinary meaning of 'employee' does not include retired workers; retired employees have ceased to work for another for hire." *Allied Chemical*, at 168. The Ninth Circuit ignores the ordinary meaning of the term "employee" when it finds that term is susceptible of meaning those who were "previously employed," -- in other words: "retirees." Doing so, however, would "utterly destroy the function of language [if read] as embracing those whose work has ceased with no expectation of return." *Id.* at 172.

The finding of the Ninth Circuit that the phrase "employees employed by the employer" within a recognition clause is susceptible of meaning those "previously employed" further conflicts with the holding of this Court that "retirees [can] not properly be joined with active employees in the [bargaining] unit that the Union represents" *Allied Chemical*, at 172, because a unit composed of active and retired workers would be "inappropriate" under the NLRA.

Accordingly, retirees are not employees for purpose of the CBA at issue in this matter and the finding of the Ninth Circuit that the phrase "employees employed by the employer" is susceptible of meaning both those currently employed and previously employed conflicts in multiple ways with the decision of this Court in *Allied Chemical*.

B. The Ninth Circuit's "Plausibility" Standard Conflicts With The Decisions Of This Court

A motion to dismiss for failure to state a claim is properly granted where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

An action to compel arbitration under a collective bargaining agreement is, in essence, a suit to compel specific performance of a contractual term (i.e., the arbitration agreement) and such an action is properly dismissed where it fails to set forth facts establishing a duty to arbitrate the grievance at issue because "arbitration is a matter of consent, and [. . .] it will not be imposed upon parties beyond the scope of their agreement." *Litton Financial Printing Div. v. National Labor Relations Board*, 501 U.S. 190, 201 (1991).

Further, the intention of parties to submit a particular subject matter to final determination outside the courts is one that "should be made manifest by plain language." *United States v. Moorman*, 338 U.S. 457, 462 (1950).

Arbitration is not required whenever a party merely asserts that another party has breached a collective bargaining agreement. "Nothing in our jurisprudence requires an employer who has not agreed to submit all contractual disputes to arbitration to submit any of its policies or decisions to the scrutiny of an arbitrator. The parties, not the courts, decide whether and to what extent their disputes will be subject to binding arbitration...." *Contra Costa Legal Assistance Workers v. Contra Costa Legal Services Foundation*, 878 F.2d 329, 330 (9th Cir. 1989), quoting *Building Materials and Construction Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1194-95 (9th Cir. 1988), cert. denied, 488 U.S. 986, 109 S.Ct. 543 (1988).

Here, the Ninth Circuit denied petitioner's motion to dismiss because it found "it is at least *plausible* that the CBA was intended to cover both current and former employees." App. 5a (emphasis added). The manner in which the Ninth Circuit applied its "plausibility" test shows that the test does not require either that the intention of the parties to submit the subject matter of the dispute to arbitration be "made manifest by plain language," *Moorman, supra,* 338 U.S. at 462, or that the arbitration clause is susceptible to an interpretation that covers the alleged dispute." *United Steelworkers of American v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

In support of its finding that the CBA at least plausibly covers changes to retiree benefits, the Ninth Circuit points to two provisions of the agreement: (1) the recognition clause, and (2) Appendix B. The Ninth Circuit concedes that "the terms of the agreement do not speak specifically of 'retired' employees." App. 5a. The two provisions of the agreement relied upon by the Ninth Circuit also do not support a finding that retirees are covered under the agreement. First, as set forth above, the recognition clause is confined to employees, not retirees. Second, Appendix B, also makes no reference either to retirees or to retiree benefits it sets forth only those benefits available to employees employed by the employer at the Oro Grande facility.

In sum, the "plausibility" test omits the requirement of this Court that the parties must manifest an intent to submit the subject matter of the dispute to arbitration.

While this Court has clearly announced its preference for the use of arbitration provisions in collective bargaining agreements as a means of achieving industrial peace, see, *United Steelworkers of American v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 577-78 (1960), permitting a party to

defeat a motion for dismissal merely by mention of the magic word "dispute" and then asserting the "plausibility" of their position, would undermine this very policy because employers would then be reluctant to adopt broad arbitration clauses. In fact, it would no longer make arbitration a matter of contract, it would make it a matter of right. This Court has never so held.

A union cannot defeat a motion to dismiss a complaint seeking to compel arbitration simply by designating a term specifically defined within the CBA as ambiguous and then asserting a "plausible" argument that this "ambiguity" exists. Where, as here, the plain language of the agreement is clear, a party should not be able to rely on unsupported and baseless claims of a "plausible dispute" in order to create an ambiguity where none exists. *See*, *California Union Ins. Co. v. American Diversified Sav. Bank*, 948 F.2d 556 (9th Cir. 1991) (courts are not required to "adopt a strained or absurd interpretation in order to create an ambiguity where none exists").

CONCLUSION

For the foregoing reasons, Petitioner urges this Court to grant a writ of certiorari in this case.

Respectfully submitted.

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATED COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-56386

PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-192, AFL-CIO,,

Plaintiff- Appellant,

v.

TXI RIVERSIDE CEMENT CO.,

DEFENDANT - APPELLEE.

D.C. No. CV-05-00406-VAP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding
Argued and Submitted June 6, 2007
Pasadena, California

Before: THOMAS and GOULD, Circuit Judges, and CHESNEY**, District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Maxine M. Chesney, Northern District of California, sitting by designation.

Paper, Allied-Industrial Chemical & Energy Workers International Union, Local 8-192 ("PACE"), appeals the district court's dismissal of its complaint for failure to state a claim. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse and remand. Because the parties are familiar with the facts and procedural history, we do not recount them here.

We review dismissals under Federal Rule of Civil Procedure 12(b)(6) de novo. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

"The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960). The Supreme Court has further explained that

> The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that

> the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*

United Steelworkers of America v Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (emphasis added); see also *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986).

Whether Riverside Cement Company ("RCC") agreed to arbitrate this dispute is a matter of contract interpretation. *Operating Engineers Local Union No. 3 v. Newmont Mining Corp.*, 476 F.3d 690, 692 (9th Cir. 2007). "To ascertain the meaning of this collective bargaining agreement, we first examine its express written terms." *Northwest Administrators Inc. v. B. V & B.R. Inc.*, 813 F.2d 223, 225 (9th Cir. 1987). "'[W]here a contract's meaning is not clear on its face, its interpretation depends upon the parties' intent at the time it was executed, which is an issue for the trier of fact." *Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1515 (9th Cir. 1985) (quoting *Laborers Health & Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 418 (9th Cir. 1983) (citations omitted)). "When the operation of an ordinary contract is not clear from its language, a court generally may consider extrinsic evidence to determine the intent of the parties in including that language." *Id.* at 1517 (citing 3 *Corbin on Contracts* § 536, 27-28 (1960)). "That principle is applied with even greater liberality in the case of a collective bargaining agreement." *Id.* "In ascertaining the intent of the parties to a collective bargaining agreement, 'the trier of fact may look to the circumstances surrounding the contract's execution, including the preceding negotiations. . . . It may also consider the parties' conduct subsequent to contract formation . . . and such conduct is to be given great

weight.'" *Id.* at 1517-18 (quoting *Laborers Health & Welfare Trust Fund*, 707 F.2d at 418 (citations omitted)). "A district court should also 'consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.'" *Id.* at 1518 (quoting *Kemmis v. McGoldrick*, 706 F.2d 993, 996 (9th Cir. 1983) (citing *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 160-61 (1966)); *see also Hendricks v. Airline Pilots Association International*, 696 F.2d 673, 676 (9th Cir. 1983). "As we have emphasized, when an agreement's meaning is not clear on its face and contrary inferences as to intent are possible, there exists an issue of material fact. . . ." *Id.*

While a collective bargaining agreement ("CBA") is a contract, it also must be construed in light of the Labor Management Relations Act, 29 U.S.C. §§ 141-187. *See Northwest Administrators Inc.*, 813 F.2d at 226 ("A collective bargaining agreement is governed by the detailed provisions of the Labor Management Relations Act, 29 U.S.C. §§ 141-187, and ERISA. It is not 'governed by the same old common-law concepts which control.. . private contracts,'") (quoting *Transportation-Communication Employees Union*, 385 U.S. at 160-61)).

Here, the parties dispute the meaning of the term "employees" in the CBA and whether the benefit plans referred to in Appendix B, Section 7, include the retiree benefit plan. While the CBA clearly distinguishes between employees based on their role and title, it does not as clearly distinguish between employees based on their time of employ. Indeed, the phrase "*employed* by the employer"—which is used to describe who is covered—is susceptible of meaning both currently "employed" and previously "employed." Had RCC intended to include only *current* employees, it could have easily used that phrase, which it used elsewhere in the

CBA. For instance, the drug-testing policy in Section 5 of Appendix C refers to "Current Employees."

Likewise, Appendix B, Section 7's reference to benefit plans could plausibly be read to include the retiree benefit plan. First, Section 7 says it includes all benefit plans, including but not limited to those listed in Appendix B. But there are no other benefit plans listed anywhere in the CBA. Second, the retiree plan meets the definition of plans referred to in Section 7 since it is a "benefit plan" that was "negotiated between the parties."

As a general matter, "a union [does not lose] all interest in the fate of its members once they retire." *United Steelworkers v. Canron*, 580 F.2d 77, 81 (3d Cir. 1978) (quoting *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, 94 n.8 (3d Cir. 1973). It is therefore not inconceivable that a union and an employer would seek to enter a CBA covering both current and retired employees. While the terms of the agreement do not speak specifically of "retired" employees, neither does it explicitly exclude them, contrary to RCC's claim. In sum, it is at least plausible that the CBA was intended to cover both current and former employees. When there is any reasonable dispute, the Supreme Court instructs that the policies embodied by the Labor Management Relations Act are best furthered when courts err on the side of finding coverage. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83; *see also Canron*, 580 F.2d at 82 (finding coverage under the CBA when "[t]he parties reasonably differ as to its meaning").

Therefore, we conclude that the district court erred in dismissing the complaint. We remand to allow the parties to develop a complete factual record and to present appropriate evidence to the district court as to the meaning of the contract.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-192, AFL-CIO,

Plaintiff

v.

TXI RIVERSIDE CEMENT CO.; AND DOES 1-10,

Defendants.

CASE NO. EDCV 05-406-VAP (SGLx)

[MOTION FILED ON JULY 7, 2005.]

ORDER GRANTING DEFENDANT RIVERSIDE CEMENT CO.'S MOTION TO DISMISS

Defendant Riverside Cement Co.'s Motion to Dismiss came before the Court for hearing on August 1, 2005. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion.

I. BACKGROUND

On May 13, 2005, Plaintiff Paper, Allied-Industrial, Chemical & Energy Workers International Union, Local 8-192, AFL-CIO filed a Compliant against Defendant TXI Riverside Cement Co. and Does One Through Ten. On May 18, 2005, Plaintiff filed an Amended Complaint seeking specific performance of the collective bargaining agreement ("CBA"). On May 20, 2005, Plaintiff served the Amended Complaint on TXI Riverside Inc. and Riverside Cement Co. as Does One and Two, respectively. The parties filed a stipulation dismissing without prejudice TXI Riverside Inc. on June 20, 2005.

Defendant Riverside Cement Co. ("Defendant RCC") filed a Motion to Dismiss on July 7, 2005. Plaintiff filed an Opposition ("Opp'n") on July 18, 2005, and Defendant RCC filed a Reply on July 25, 2005.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Dismissal is appropriate when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the pleading. See Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999).

The Court must view all allegations in the complaint in the light most favorable to the non-moving party and must accept all material allegation – as well as any reasonable inferences to be drawn therefrom – as true. See Big Bear Lodging Ass'n, 182, F.3d at 1101; Am. Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002).

III. DISCUSSION

In the Amended Complaint, Plaintiff seeks specific performance of the arbitration provision in the CBA in order to compel Defendant to arbitrate a grievance filed regarding changes in the health benefit plans of retired employees. [See Amended Complaint ("Am. Compl.") ¶ 10.] Defendant RCC asserts that Plaintiff cannot state a claim for specific performance because it "cannot allege [that Defendant RCC] has breached any term of the CBA with regard to retiree benefits since retiree benefits are not covered under the CBA." [Mot. at 7.] According to Defendant RCC, "[t]he explicit terms of the CBA specifically cover only production and maintenance *employees* employed by [Defendant RCC] at its Oro Grande facility." [Id.]

Plaintiff maintains that Defendant RCC is required to arbitrate this grievance because it fails to show "that the arbitration clause is not susceptible of an interpretation that covers this dispute." [Opp'n at 8 (quoting United Steel Workers v. Canron, Inc., 580 F.2d 77, 82 (3d Cir. 1978)).] The arbitration clause in the CBA covers grievances regarding retiree benefits, according to Plaintiff, in language found in the Appendix B, Section 7, of the CBA, stating: "All Benefit Plans, including, but not limited to, those named in this Appendix B, were negotiated between the parties and cannot be amended, replaced and/or terminated unless required by applicable laws and/or regulations, or upon negotiations with the Union." [Mot., Ex. A at 81.[3]] According to Plaintiff,

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[3] Defendant RCC asks the Court to take judicial notice of nine documents attached to the Motion Exhibits A through I. [Defendant's Request for Judicial Notice in Support of Motion.] Plaintiff objects to six of these documents, which it maintains are not specifically referred to or necessarily relied upon in the Complaint. [Opp'n at 3 (citing Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir.

a plausible interpretation of this language encompasses retired employees' benefits because "[i]f this provision covered only current employees, there would be no reason to include it in the CBA, because the health benefits of current employees are a mandatory subject of bargaining under the NLRA and, therefore, cannot be changed except 'upon negotiations with the Union' already under the NLRA." [Opp'n at 6.] Thus, Plaintiff argues, an interpretation of the Appendix B, Section 7 that does not cover retired employees' benefits would render that provision surplausage.[4]

Defendant RCC asserts that Appendix B, Section 7 does not cover retired employees because under the CBA they are not "employees", which is defined as "[a]ll production and maintenance employees employed by the employer at its Oro Grande, California facility." [Reply at 2; Mot., Ex. A at 14.] Defendant RCC also contends that retired employees fall outside the scope of the CBA as they are never explicitly referred to in the CBA and are not a subject of mandatory bargaining under the National Labor Relations Act. [Mot. at 7-8; Reply at 2.]

There is no basis for construing Appendix B, Section 7 of the CBA to control retired employees' benefits because retired employees are not "employees" as defined in the CBA. The Court is not persuaded by Plaintiff's contention that Appendix B, Section 7 is susceptible to an interpretation covering the benefits of retired

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1984)).] Plaintiff has no objection to three exhibits—Exhibits A, F, and H—which were referred to and relied on in the Complaint. The Court sustains Plaintiff's objections to Exhibits B, C, D, E, G, and I, and takes judicial notice of Exhibits A, F, and H.

[4] Plaintiff's counsel reiterated this point at the hearing on August 1, 2005, and also argued that Defendant RCC failed to proffer any alternative interpretation of this language.

employees because an interpretation of this provision that is limited to current employees would render it entirely superfluous. This argument may be persuasive where the CBA defined "employees" to include retired employees or where other provisions expressly make reference to retired employees, as in the case cited by Plaintiff; however, there is no such evidence here. Therefore, even assuming that Defendant's proffered interpretation would render this provision a redundant statement of governing law, that alone does not support its contention that this provision is susceptible to an interpretation covering retired employees' benefits.

In Canron, the employer and union disputed the application of the collective bargaining agreement to retired employees of a company acquired by the employer. 580 F.2d at 78-79. The employer maintained that the retired employees of the predecessor company were not covered by a bargaining agreement memorialized years after the acquisition of the predecessor company because these retirees were never employed by the employer. Id. at 80. The Third Circuit compelled arbitration, finding that the parties reasonably differed as to the proper interpretation of a provision in which the employer "agree[d] to provide Blue Cross and Blue Shield coverage for retired employees and all eligible dependants." Id. at 78-79, 82. The court stated that the employer's argument was "not sufficient in the circumstances [of the case] . . . to meet [the employer's] burden that the arbitration clause is not susceptible of an interpretation that covers this dispute." Id. at 82.

Here, Defendant RCC has met its burden of demonstrating that the arbitration clause is not susceptible of an interpretation covering Plaintiff's grievance. The CBA between Plaintiff and Defendant RCC does not include a provision analogous to the one found in teh Canron case, which expressly provided health care coverage for a

class of retired employees. Given that the CBA defines "employees" as persons "employed" by Defendant RCC at its Oro Grande facility and the agreement contains no express reference to retired employees, the arbitration clause in the CBA is not susceptible to an interpretation covering Plaintiff's grievance. Therefore, Plaintiff fails to state a claim for specific performance of the CBA.

IV. CONCLUSION

For the foregoing reasons, Defendant RCC's Motion to Dismiss is GRANTED.

IT IS SO ORDERED